No. 80-562

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CYRUS HATAMI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Respondent, State of New Jersey,
State House Annex,
Trenton, New Jersey 08625.
(609) 452-9500

JOHN DECICCO,
Assistant Attorney General,
Division of Criminal Justice,
Appellate Section,
Of Counsel.

ALLAN J. NODES,
Deputy Attorney General,
Of Counsel and On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Question Presented

Do the past decisions of this Court indicate that *Arkansas* v. *Sanders*, 422 U.S. 753 (1979) and *United States* v. *Chadwick*, 433 U.S. 1 (1977) should be applied retroactively.

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On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Opinions Below

The opinion of the Appellate Division of the Superior Court of the State of New Jersey dated June 27, 1979, is appended to petitioner's Petition for Certiorari at pages 1a-6a. The opinion of the Appellate Division of the Superior Court of the State of New Jersey dated November 21, 1979, is appended to the petition at pages 7a to 9a. The order of the Supreme Court of the State of New Jersey

dated February 15, 1980, denying petitioner's petition for certification is appended to the petition at page 10a. The order of the Supreme Court of the State of New Jersey dated April 30, 1980, denying petitioner's motion for a rehearing of the order denying his petition for certification is appended to the petition at page 11a.

Jurisdiction

The State of New Jersey agrees that 25 U.S.C. sec. 1257 (3) is the basis for this Court's jurisdiction.

Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Article VI, Clause 2.

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Supreme Court Rule 17:

Considerations Governing Review of Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Constitution of the State of New Jersey, Article 1, Paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, except upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19. Prohibited acts.

A. Manufacturing, distributing, dispensing—Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense a controlled dangerous substance; or

* * *

b. Any person who violates subsection a. with respect to:

* * *

(2) A substance, in a quantity of one ounce or more including any adulterants or dilutants, classified in Schedules I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for up to life, a fine of not more than $25,000.00, or both; or

* * *

N.J.S.A. 24:21-20. Prohibited acts.

B. Possession, use or being under influence—Penalties.

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to:

* * *

(2) A substance, in a quantity of 1 ounce or more including any adulterants or dilutants, classified in Schedule I or II which is a narcotic drug, provided that there are included at least 3.5 grams of the pure free base Schedule I or II narcotic drug, is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 7 years, a fine of not more than $15,000.00, or both;

* * *

Statement of the Case

On March 11, 1977, the New Jersey State Police received an indictment warrant for petitioner and two other persons. The indictments were for conspiracy to import morphine. (Petitoner's appendix at 2a). In an attempt to locate these individuals State Police officers began a twenty-four hour surveillance of apartment No. 7 at 31 Cedar Avenue in Long Branch. At approximately 1:30 p.m. on March 12, 1977, a 1977 Ford was observed pulling into the parking lot adjacent to the apartment building and two

males, one of whom was later identified as petitioner, entered the apartment. Petitioner carried a red airline bag into the residence. It was determined that defendant had rented the vehicle from a Freehold rental agency. (Petitioner's appendix at 2a).

Approximately one-half hour later a second car arrived and two individuals, later identified as Keith Gordon and April Knipple, entered the apartment. At approximately 2:35 p.m. Gordon and Knipple left the apartment and Gordon placed some object under the dashboard of the car. The police followed the car, stopped it and asked the occupants to exit. One of the officers then reached under the dash and found a white jar with a powdery substance. Gordon and Knipple were then arrested. (Petitioner's appendix at 3a to 4a).

At about 3:15 p.m. petitioner left the residence at 31 Cedar Avenue with a different type of gym bag than that with which he had entered the residence. He placed this bag in the trunk of the car. Petitioner then entered the car with another individual from the apartment and drove away. Officers following petitioner's car observed that it was operated in an erratic manner. Petitioner was over compensating on curves, and crossing over lines. Due to the erratic manner in which petitioner was operating his vehicle and the intervening discovery of suspected narcotics in the other vehicle, the State Police determined that they would intercept petitioner's vehicle before it reached its next destination. Petitioner's vehicle was then stopped at the Eatontown Circle. (Petitioner's appendix at 3a).

One of the police officer's produced State Police identification and ordered the petitioner to turn off the engine. After this and several other requests were ignored the officer reached into the car and turned off the engine himself. (Petitioner's appendix at 3a).

Petitioner exited the car and both police officers noticed that petitioner had difficulty walking and speaking. In addition, one of the officer's smelled the odor of marijuana on his clothing and his person. One of the officers then requested petitioner's driver's license, verified his identity, and placed him under arrest. (Petitioner's appendix at 3a).

One of the officer's began a search of the passenger compartment of the automobile while another searched the trunk. (Petitioner's appendix at 3a). The items which were found in the automobile formed the basis for petitioner's motion to suppress.

Petitioner was indicted for possession of heroin with intent to distribute contrary to N.J.S.A. 24:21-19a(1) and 24:21-19b(2) (Count I) and possession of heroin contrary to N.J.S.A. 24:21-20a((2) (Count II). On June 22, 1977, the Honorable Donald J. Cunningham, J.C.C., denied petitioner's motion to suppress evidence. Petitioner was tried before the Honorable John P. Arnone, J.S.C., on October 12 and 13, 1977. On October 13, 1977, he was found guilty of both counts of the indictment. On December 16, 1977, petitioner was sentenced to a term of 25 to 30 years in State Prison on Count I and a concurrent 5 to 10 years on Count II. (Petitioner's appendix at 2a).

Petitioner filed Notice of Appeal on December 16, 1977. On June 27, 1979, the Appellate Division affirmed defendant's conviction. (Petitioner's appendix at 1a to 6a).

On July 5, 1979, defendant filed a Petition for rehearing. This petition was granted limited to the issues raised in *Arkansas* v. *Sanders,* on July 23, 1979. Following the rehearing the Appellate Division again affirmed petitioner's conviction. (Petitioner's appendix at 7a to 9a).

The Supreme Court of the State of New Jersey denied petitioner's petition for certification on February 15, 1980. (Petitioner's appendix at 10a). Petitioner's motion for a rehearing of the denial of his petition for certification was denied on April 30, 1980. (Petitioner's appendix at 11a).

Summary of Argument

There is, in general, no constitutional right to retroactive application of constitutional doctrines. In fact, this Court has clearly indicated extreme reluctance to grant retroactive application to exclusionary rule doctrines. Since *United States* v. *Chadwick,* 442 U.S. 753 (1979) and *Arkansas* v. *Sanders,* 433 U.S. 1 (1977) represent major changes in our law and the prior law was relied on extensively by law enforcement personnel and the courts, these opinions should be given only prospective application.

ARGUMENT

POINT I

The petition does not present a substantial question because this Court's prior decisions indicate that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) and *United States* v. *Chadwick*, 433 U.S. 1 (1977) should be applied prospectively.

Petitioner contends that the courts of the State of New Jersey have violated his constitutional right to be free of unreasonable searches and seizures by refusing to apply the decisions in *Arkansas* v. *Sanders, supra,* and *United States* v. *Chadwick, supra,* retroactively. This argument misinterprets both the purpose of the exclusionary rule and the law of retroactivity.

It should first be noted that on three separate occasions this Court has denied petitions for certiorari submitted by New Jersey petitioners who raised the precise issue raised herein. *Epp* v. *New Jersey,* —— U.S. —— (Docket No. 79-1861, *cert.* den. Oct. 6, 1980); *Sarto* v. *New Jersey,* —— U.S. —— (Docket No. 80-5284, *cert.* denied October 20, 1980); *Kaufman* v. *New Jersey,* —— U.S. —— (Docket No. 80-216, *cert.* denied October 14, 1980).

It should be remembered that criminal defendants do not have a constitutional right to have evidence suppressed. See, *Stone* v. *Powell,* 428 U.S. 465, 486-487 (1976); *United States* v. *Peltier,* 422 U.S. 531, 535-537 (1975); *Desist* v. *United States,* 394 U.S. 244, 250 (1969). Rather, they have the right to be free from unreasonable searches and seizures. Although of constitutional origin [*Mapp* v. *Ohio,* 367 U.S. 643, 649-654 (1961)] the exclusionary rule is merely a "procedural weapon" for the enforcement of constitutional rights. *Desist* v. *United States, supra* at 250; *Linkletter* v. *Walker,* 381 U.S. 618, 638 (1965). Therefore, this Court in *Linkletter* specifically declined to give retroactive effect to its earlier decision in *Mapp* v. *Ohio, supra.*

There is no per se constitutional violation inherent in refusing to grant retroactive effect to new exclusionary rule doctrines. Indeed, in *Linkletter* this Court unequivocally stated that "the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the Federal Constitution has no voice on the subject.' 381 U.S. at 629 (citing *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932). Moreover, this Court has been extremely reluctant to give retroactive effect to constitutional rules which do not impact on the truth finding process. *Gosa* v. *Mayden,* 413 U.S. 665 (1975). In *United States* v. *Peltier, supra,* this Court found that the exclusion of evidence obtained in vio-

lation of Fourth Amendment guarantees came within this classification. 442 U.S. at 534-537. See also *Bowen* v. *United States,* 422 U.S. 916 (1975).

The State emphasizes that *Sanders* and *Chadwick, supra,* have no application to the case currently under review. However, should this Court view the instant matter as an appropriate vehicle to decide the retroactivity of *Sanders, supra,* we offer the following observations. The application of new extensions of the exclusionary rule has been expressly rejected by this Court. See, *e.g., Williams* v. *United States,* 401 U.S. 646 (1970) and *Desist* v. *United States, supra.* Any conceivable doubt as to the Court's position on this issue was totally removed in *United States* v. *Peltier, supra,* wherein the condemnation of roving border patrol searches expressed in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), was accorded no effect to the *Peltier* case. The Court prefaced its determination thusly:

> *Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect.* In those cases where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . the doctrine has quite often been applied retroactively. *It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional prin-*

> *ciples would be accorded only prospective application. United States* v. *Peltier, supra* at 535; (emphasis supplied; citations and footnote omitted.)

The State believes that utilization of the proper standards and, more importantly, appreciation of the fundamental purpose of the exclusionary rule clearly militate in favor of prospective only application of the *Sanders* decision. In *Stovall* v. *Denno,* 388 U.S. 293 (1967), this Court declared that the tests to be used in determining whether to grant retrospective application to constitutional rules are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard.

Id. at 297.* See *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1960).

When these criteria are applied to *Chadwick* and *Sanders,* it becomes evident that only prospective applica-

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* Petitioner implies that in *State* v. *Howery,* 80 N.J. 563, 404 A.2d 632 (1979) (New Jersey Supreme Court refused to give retroactive effect to this Court's decision in *Franks* v. *Delaware,* 438 U.S. 154 (1978)) the court's decision was reached solely by applying guidelines established in *State* v. *Nash,* 64 N.J. 464, 317 A.2d 689 (1974). It is to be noted that the *Nash* guidelines are precisely those set forth by this Court in *Stovall.* Indeed, the Supreme Court of New Jersey specifically cited this Court as the authority for the rules set forth in *Nash. Id.* at 471-472, 317 A.3d 692-693. Therefore, the New Jersey Supreme Court clearly used the proper standard in *Howery.* The same standard was applied by the Appellate Division of the New Jersey Superior Court in this case.

tion should be given these opinions. The purposes of the exclusionary rule can in no way be advanced by giving retroactive application to new decisions in the law of search and seizure. If the police gain evidence in a manner which they have reason to believe is acceptable and that evidence is suppressed due to a later change or clarification of the law in that area the only benefit will be to the criminal who is set free even though there is no doubt as to his guilt. Our society cannot gain since there could not possibly be any deterent effect in such application of the exclusionary rule. The exclusionary rule and the rules set forth in *Chadwick* and *Sanders* cannot be advanced by retroactive application. See, *Brown* v. *Louisiana*, —— U.S. ——, 100 S.Ct. 2214, 2219 (1980); *United States* v. *Peltier, supra* at 538-539; *State* v. *Patino*, 80 N.J. 1, 5 n.2, 401 A.2d 1094, 1095 (1980); *State* v. *Howery, supra*, at 569, 401 A.2d at 635.

With regard to the second factor it is clear that police officers relied substantially on cases such as *Carroll* v. *United States*, 267 U.S. 132 (1925) and *Chambers* v. *Maroney*, 399 U.S. 42 (1972), in searching the contents of automobiles when probable cause was present. Prior to the decision in *Chadwick* there was no reason to believe that suitcases were outside the automobile exception. See, *State in the Interest of A.C.*, 115 N.J. Super. 77, 278 A.2d 225 (App. Div. 1971); *State* v. *Smith*, 113 N.J. Super. 120, 273 A.2d 68 (App. Div. 1971). Indeed, this Court in *Sanders* recognized that both courts and law enforcement officers have often found difficulty in applying previous Fourth Amendment decisions to individual cases. 99 S.Ct. at 2589. To hold police officers to a standard which the Supreme Court of the United States has found the courts unable to meet would be unreasonable. Moreover, there can be little doubt that retroactive application

of *Chadwick* and *Sanders* would place a significant burden on the administration of justice.

Application of the factors set forth in *Stovall* v. *Denno, supra,* lead to the inescapable conclusion that *Sanders* and *Chadwick* have no bearing on the case at bar. See, *United States* v. *Calandrella,* 605 F.2d 236 (6 Cir. 1979); *United States* v. *Steward,* 595 F.2d 500, 503 (9 Cir. 1979); *United States* v. *Berry,* 571 F.2d 2 (7 Cir. 1978) (on rehearing) *cert. den. sub. nom. Richardson* v. *United States,* 439 U.S. 840 (1978); *United States* v. *Choate,* 576 F.2d 165, 182 n.20 (9 Cir. 1978), *cert.* den. 439 U.S. 954 (1978); *United States* v. *Reda,* 563 F.2d 510 (2 Cir. 1977), (holding *Chadwick* to be prospective only); *California* v. *Minjores,* 24 Cal.3d 410, 591 P.2d 514, 153 Cal.Rptr. 224 (Sup. Ct. 1979), *cert. den.* —— U.S. ——, 62 L.Ed.2d 117 (1979). *State* v. *Kahlon,* 172 N.J. Super. 331, 341, 411 A.2d 1178, 1183 (App. Div. 1980); *Kemner* v. *Texas,* —— S.W.2d ——, 25 Cr.L.Rptr. 3196 (Texas Ct. of Crim. App. 1979); *Nastu* v. *State,* 589 S.W.2d 434, 26 Cr.L.Rptr. 2117 (Tex. Ct. Crim. App. October 3, 1979). But see, *United States* v. *Dien,* 615 F.2d 10 (2 Cir. 1980); *United States* v. *Miller,* 608 F.2d 1089 (5 Cir. 1979), (holding that *Sanders* is retroactive to *Chadwick* only); *United States* v. *Mackay,* 606 F.2d 264 (9 Cir. 1979); and *United States* v. *Gooch,* 603 F.2d 122 (10 Cir. 1979).

Based on the foregoing it is clear that the New Jersey courts properly decided that *Chadwick* and *Sanders* should not be given retrospective application.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney for Respondent, State of New Jersey,
State of New Jersey,
State House Annex,
Trenton, New Jersey 08625.
By: JOHN DECICCO,
Assistant Attorney General.

JOHN DECICCO,
Assistant Attorney General,
Division of Criminal Justice,
Of Counsel.

ALLAN J. NODES,
Deputy Attorney General,
Division of Criminal Justice,
On the Brief.